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Supranational Governance in the Area of Freedom, Security and Justice after the Stockholm Programme

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Following several months of uncertainty in the wake of the rejection of the Treaty establishing a Constitution for Europe, the Lisbon Treaty eventually entered into force in December 2009. Although it fell short of establishing a Constitution for the European Union (EU), it introduced

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several noteworthy changes, notably for EU internal security policies, also known as the ‘Area of Freedom, Security and Justice’ (AFSJ). This special issue considers how various dimensions of the AFSJ have been affected by the Lisbon Treaty and the gradual reinforcement of supranational governance that it has generated in this key policy area.

Over the past decade, the AFSJ has experienced tremendous development, making it one of the most dynamics areas of European integration. The AFSJ is a broad and heterogeneous policy domain, which includes asylum, immigration, and border policies, counter-terrorism, justice and police cooperation, as well as the external dimensions of these activities. Given the crucial importance of current internal security threats, such as terrorism, and the sensitivities surrounding policy responses to those, it is necessary to take stock of how far the EU has progressed toward its goals of an ‘Area of Freedom, Security and Justice’ and how this has been influenced by the most recent treaty changes. To accomplish this goal, this special issue brings together some of the most distinguished scholars in the field and several younger scholars conducting cutting-edge research on the AFSJ.

The rapid development of the AFSJ in recent years has led to an expansion of the scholarly literature on this topic, including legal analyses (Walker, 2004; Peers, 2006, 2012). Most scholars have argued that EU policy developments have been mainly driven by security concerns and that, as a result, freedom, justice, as well as human rights, have been relatively neglected, if not damaged (Monar, Rees & Mitsilegas, 2003; Baldaccini, Guild & Toner, 2007; Balzacq & Carrera, 2006; Huysmans, 2006; Guild & Geyer, 2008; van Munster, 2009; Bigo, Carrera, Guild & Walker, 2010). Other works have focused on examining the policy developments in EU internal security using Security Studies frameworks and concepts, such as ‘homeland security’ (Kaunert, Léonard & Pawlak, 2012) and ‘comprehensive security’ (Kaunert

& Zwolski, 2013). Recently, some literature has also emerged on the external dimension of the EU internal security policies. It has particularly emphasised how the EU has sought, and managed in some cases, to exercise some level of influence on the internal security policies of third states, in particular in its neighbourhood (Balzacq, 2009; Wolff, Wichmann & Mounier, 2009; Wolff, 2009, 2012; Trauner, 2011).

The literature on the AFSJ in general has also been complemented by more specialised works, which have focused on one specific internal security policy. In that respect, the EU counter-terrorism policy has arguably been the focus of most debates (Zimmermann, 2006; Spence, 2007; Eckes, 2009; Brown, 2010; Bures, 2006, 2011; Argomaniz, 2011; Kaunert & Léonard, 2011; Léonard & Kaunert, 2012; Kaunert, Léonard & MacKenzie, 2012; Bossong, 2008, 2012; MacKenzie, Kaunert & Léonard, 2013), whilst the EU asylum and migration policy (Baldaccini, Guild & Toner, 2007; Geddes, 2008; Léonard, 2009; Boswell and Geddes, 2011), EU cooperation on criminal justice matters (Fletcher & Lööf, 2008; Eckes & Konstadinides, 2011), and EU police and judicial cooperation (Anderson & Apap, 2002; Occhipinti, 2003; Guild & Geyer, 2008) have also received some attention. In contrast, institutional issues have overall been less studied, apart from some early works focusing on the legal intricacies of the then ‘third pillar’ (e.g. Bieber & Monar, 1995), Kaunert’s works (Kaunert, 2005, 2007, 2010a, 2010b, 2010c; Kaunert & Della Giovanna, 2010) on the role of the European Commission and the Secretariat of the Council in the AFSJ, as well as the emerging literature on the European Parliament’s role (Ripoll Servent, 2010, 2011; Ripoll Servent and MacKenzie, 2011).

Thus, little attention has generally been given to the institutional arrangements governing European internal security. Actually, the EU has now acquired an impressive legal and institutional infrastructure to manage its external borders and combat transnational organised

crime and terrorism. This is the result of an incremental process that began in earnest with the entry into force of the Maastricht Treaty in 1993, which made “justice and home affairs” (JHA) a formal policy area of the EU.

However, the nature of decision-making on JHA was highly intergovernmental during its earliest years. Even as the Maastricht Treaty bestowed new legislative powers on the European Parliament (EP) in many areas pertaining to the Single Market, the EP remained largely excluded from decision-making on JHA. Moreover, the legal basis of the EU’s “third pillar” on JHA, as it was then known, also prevented the European Commission from playing a meaningful role in policy development. The European Court of Justice (ECJ) was also side-lined in this policy domain. In addition, Member States were still protective of their national sovereignty on internal security and retained the right to veto legislation on JHA. With only few exceptions, this intergovernmental setting contributed to slow progress on JHA during the 1990s.

Over time and through a series of reforms to its treaties, the EU’s policy environment for internal security gradually changed. With each reform, the role of the supranational Commission, EP and Court of Justice gradually increased, whilst the areas of law-making subject to national vetoes in the Council decreased. The Lisbon Treaty can be seen as the latest step in this process, which has gradually brought about a degree of supranational governance in the EU internal security policy domain.

Along the way, the EU has established ambitious, multi-year policy programmes for creating and implementing new legislation, mechanisms, and institutions across the whole AFSJ. This began in 1999, when the Amsterdam Treaty entered into force, which established the broad objective of creating the AFSJ. In order to achieve this objective, the EU heads of state or government convened a special meeting of the European Council in October 1999 and agreed

upon the so-called ‘Tampere Programme’, which set out the agenda for developing the AFSJ in the following five years. Actually, progress would be helped by a series of crises and shocks that drew attention to the challenge of managing internal security in the EU. This included the death of 58 human smuggling victims in a shipping container in 2000, the terrorist attacks on the US of 11 September 2001, gains made by far-right political parties in some member states on the issue of irregular immigration in 2002 and the terrorist attacks on Madrid in March 2004. During this time, progress on the realisation of the AFSJ was also promoted by the expectation that several states would soon join the EU, which would complicate decision-making on new legislation and magnify many of the existing security challenges. Indeed, during the period of 1999-2004, there was much progress in the AFSJ on many fronts, ranging from the adoption of the European Arrest Warrant, the harmonisation of substantive criminal law for some crimes, the creation of Eurojust (a liaison network of criminal prosecutors), CEPOL (European Police College), the post of Counter-Terrorism Coordinator, and Frontex (the external border management agency), as well as the development of enhanced security relationships with third countries, such as the United States.

In November 2004, the EU approved the next multi-year agenda for the AFSJ, known as ‘the Hague Programme’, which set priorities until 2009. In many regards, this simply followed on from the Tampere agenda. It was mainly directed at completing ongoing initiatives and making the most of newly created institutions. However, it was also shaped by new perceptions of security threats and priorities, such as terrorism and many aspects of border security. At the same time, the new agenda was also conceived amid optimism for European integration with regard to the growing membership of the EU and initial progress on the Treaty establishing a Constitution for Europe. By the end of 2005, the EU’s policy agenda was also influenced by the

terrorist attacks in London on 7 July 2005 and the development of its first comprehensive Counter-Terrorism Strategy.

Subsequently, the AFSJ remained the most dynamic policy of the EU, but the pace of new legislation somewhat slowed down compared to the immediate post-9/11 period under the Tampere agenda. One reason for this was the rejection of the Treaty establishing a Constitution for Europe, the ensuing malaise concerning European integration and the endurance of national vetoes. By the summer of 2007, the plans for a constitution were scaled back and incorporated into what would become the Lisbon Treaty. Although this new treaty would be finalised and signed on 13 December 2007, it would not enter into force before 1 December 2009.

Moreover, this new Treaty would lack several of the bold innovations for the AFSJ that had been proposed by the Constitutional Convention, which had drafted the Treaty establishing a Constitution for Europe. For example, the vision of a true ‘bill of rights’ for an EU constitution had been replaced by a less impressive Charter of Fundamental Rights attached to the new treaty via a protocol. The vision of an EU Public Prosecutor with extensive powers was scaled back to an option to create a prosecutorial component within Eurojust that would be limited to the protection of the EU’s finances. Instead of the complete elimination of national vetoes for the harmonisation of criminal law, the interests of member states were to remain protected by emergency brakes that could block new legislation. In addition, the delay caused by the rejection of the Treaty establishing a Constitution for Europe afforded the UK the opportunity to change its position and eventually win the option of opting out of many aspects of the AFSJ, which is it now considering the exercise. In addition, the delayed ratification of the Lisbon Treaty coincided with the onset of a financial and economic crisis in the Eurozone in 2008. This crisis has not only been a distraction; it has actually cast a shadow of doubt over the future progress of European

integration, including the further development of the AFSJ.

Nevertheless, progress on the AFSJ continued on many fronts under the Hague Programme. Again, progress was recorded with regard to many aspects of the AFSJ, including the adoption of some common minimum standards for asylum systems, the decision to create a Visa Information System (VIS) to support the Schengen zone, the adoption of a variety of measures regarding data retention and information-sharing for law enforcement, the negotiation of key agreements with third countries, notably on the sharing of Passenger Name Record (PNR) data with the United States, as well as the incorporation of the EU's AFSJ objectives in its neighbourhood policy.

Despite mixed results in some areas and implementation delays in others, the Commission analysed the achievements of the Tampere and the Hague Programmes in a positive light, particularly with regard to the principles of freedom, security, and justice and the balance among these across a wide range of new measures. Yet, it is precisely what has been criticised by a number of scholars, some non-governmental organisations (NGOs), and some Members of the European Parliament (MEPs). They have notably claimed that various measures in the AFSJ have threatened the right to privacy of European citizens, as well as the human rights of irregular immigrants and refugees trying to enter the EU.

At the end of 2009, a successor programme to the Tampere and Hague Programmes was developed under the Swedish Presidency. Called the 'Stockholm Programme', it was adopted at a special EU Council Summit on 10-11 December 2009. The new agenda covers the period 2010-2014 and emphasises six areas of priority. The first of these is the promotion of citizenship and fundamental rights, particularly those identified in the Charter of Fundamental Rights, including notably the protection of personal data and human rights. Secondly, the priority

concerning ‘a Europe of law and justice’ promotes greater access to justice for citizens through training of and cooperation amongst professional, as well as the elimination of any barriers to the recognition of legal decisions in other member states. Thirdly, regarding ‘a Europe that protects’, the Stockholm Programme prioritises the goals of the EU Internal Security Strategy, particularly strengthening cooperation in law enforcement, border management, civil protection, disaster management, as well as judicial cooperation in criminal matters. This priority area also highlights the Lisbon Treaty’s innovative solidarity provision (Article 222 of the Treaty on the Functioning of the European Union (TFEU)) that commits member states to act jointly if one of them is the victim of a terrorist attack or a natural or man-made disaster. The fourth priority area concerns the ‘access to Europe in a globalized world’. It refers to the need to strengthen the EU’s integrated border management system and visa policies to provide security, whilst ensuring access for legitimate travellers and those in need of international protection. Fifthly, the Stockholm Programme highlights the importance of ‘A Europe of responsibility, solidarity and partnership in migration and asylum matters’. This emphasises effective policies based on solidarity and responsibility, including the need to develop a common asylum system and ‘prevent, control and combat illegal immigration’. The sixth and final priority area is ‘the role of Europe in a globalised world’, which calls for increased and coherent integration of the AFSJ into the EU’s external policies.

In the context of these priorities established by the Stockholm Programme, as well as the innovations introduced by the Lisbon Treaty, this special issue analyses policy change in the AFSJ, especially as it has been affected by the rise of supranational governance in this domain. Each of the contributions included here deals with a different dimension of this issue. Collectively, this special edition considers how consequential the Lisbon Treaty has been for the

AFSJ, as well as how successful the EU has been in achieving its stated goals as expressed in the Stockholm Programme.

Monica den Boer's article examines the impact of the Lisbon Treaty on police cooperation. While the EU's latest treaty makes some gains in this area, den Boer argues that further steps are still needed for establishing a more coherent and consistent system of European police cooperation, as well as improved parliamentary involvement, independent oversight and a European-wide cultivation of police professionalism. To achieve this, the European Commission will have to maximise its competences under the Lisbon Treaty, but this might be insufficient to overcome the attachment of member states to national sovereignty in the policing domain.

Similarly, Raphael Bossong is rather critical of the EU's plans to prevent radicalisation that can lead to terrorism. His article highlights the way in which the Stockholm Programme has renewed this ambition, which has emphasised the role of sub-national levels of government and support for the horizontal exchange of experiences, best practices and information. Bossong concludes that the proposed network of local and professional actors could indeed make a contribution to the identification and prevention of radicalism, but that it should not be expected to provide a major breakthrough for EU counter-terrorism.

John Occhipinti is somewhat less pessimistic in his evaluation of the effect of the Lisbon Treaty on the EU's so-called 'democratic deficit'. He concludes that the Lisbon Treaty has addressed the democratic deficit from the perspective of "throughput"-based legitimacy, given stronger roles for the EP, the Court of Justice of the EU, and national parliaments. These same changes have also improved output-based legitimacy regarding accountability. However, legitimacy measured in terms of efficient outcomes could actually be harmed by the politicisation of some aspect of the AFSJ. Moreover, little has been done to address input-based

legitimacy, because the Lisbon Treaty cannot be expected to foster a proper debate on the goals of the Stockholm Programme or its successor among national politicians and citizens.

Marat Markert takes a different approach in his article. Instead of evaluating the effect of the Lisbon Treaty on a particular aspect of the AFSJ, he examines the policy environment that it has modified in order to study a broader theoretical question related to institutional change and European integration: despite increasing institutional constraints, why have national governments been successful in deliberately countering pro-integrationist legislative proposals by the European Commission? Focusing on criminal justice and police cooperation and taking into account developments since 1999, Markert's article explains the interplay between increasing institutional constraints on the policy discretion of actors at the EU level and their policy preferences. He reaches the conclusion that member states deploy strategies of legislative pre-emption, which allow them to overcome both preference heterogeneity in the Council and structural impasses that are usually assumed to benefit supranational actors, particularly the European Commission.

Emek M. Uçarer also takes up an issue that has been examined by EU scholars outside the realm of the AFSJ, namely the role and impact of NGOs on policy-making. Key issues in her study include when and why NGOs pick a particular level of governance at which to operate. Uçarer argues that the EU-NGO interface is affected by the institutional realities of the EU, the opportunity structures that those have created for lobbying, and the capacities of NGOs to exploit these opportunity structures. Her contribution focuses on immigration, asylum, and judicial cooperation in criminal matters and explains NGO strategies in the EU policy environment as it has been shaped by the Lisbon Treaty and the Stockholm agenda.

Jörg Monar's article considers the internal factors and external pressures that have

influenced the development of the external dimension of the AFSJ. On the basis of his analysis in terms of strategy formulation, cooperation with third countries, capacity-building and cooperation with and within international organisations, Monar brings to light a few major shortcomings of the external dimension of the AFSJ. While recognising many past achievements and areas of likely growth in the future, Monar argues that the coherence and effectiveness of the external side of the AFSJ has been diminished by the diversity of the fields covered in this area and the complex post-Lisbon decision-making structures, such as provisions for opt-outs.

Raül Hernández also considers an external aspect of the AFSJ, as he focuses his analysis on the EU's promotion of its Integrated Border Management (IBM) model in the context of the Treaty of Lisbon and the Stockholm Programme. Hernández's article analyses the roles of Frontex and the EU mission at the Ukrainian-Moldovan border (EUBAM) in exporting IBM to Russia and the Eastern Partnership countries. He notably shows that the development of IBM in Eastern Europe has taken place because it is a condition for the progress of cooperation in other areas, such as visa liberalisation or the establishment of Mobility Partnerships. Thus, Hernández's article also raises questions as to how effectively IBM can be exported by Frontex, as well as how the EU can carry out the goals of IBM in the Southern Mediterranean region, where it lacks the kind of leverage that it enjoys over Eastern Europe.

Collectively, the articles gathered in this special issue demonstrate that the Lisbon Treaty and the Stockholm Programme have had a profound impact on the AFSJ. From police cooperation and crime fighting to border management and counter-terrorism, much has changed, and the EU has taken yet another step forward in the direction of supranational governance. However, the various contributions also highlight that there are still problems and challenges remaining for the AFSJ. In any case, this special issue makes a significant contribution to the

scholarly investigation of the AFSJ, but also to the study of European integration in general, including the topics of institutional dynamics, democracy, the influence of NGOs, and the EU's role as an actor on the world stage. Thus, we hope that both specialists focusing on the AFSJ and scholars from other fields will find the articles included here to be valuable for their theoretical and empirical studies.

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